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IN THE.

Supreme Court of the United States

October Term, 1956
No. 358

HOMER W. SNOWDEN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California.

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California.

Petitioner prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of California, entered in the above-entitled case on May 22, 1957 (Appendix A), on which date it denied the petition for hearing filed by petitioner which sought to review an order of the Superior Court of the County of Los Angeles, State of California, made August 24, 1956, denying petitioner's motion to set aside and vacate the judgment of conviction against him, and to permit him to withdraw his pleas of guilty to two counts of an indictment and enter pleas of not guilty thereto. Said order of the Superior Court was affirmed by the District Court of Appeal on March 29, 1957, which court is in possession of the record.

Opinion Below.

Neither the Superior Court nor the Supreme Court of the State of California filed an opinion. The opinion of the District Court of Appeal, Second Appellate District, Division Two, State of California, filed March 29, 1957, is printed in Appendix A hereto.

Jurisdiction.

The Supreme Court of the State of California denied petitioner a hearing on May 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Questions Presented.

The important questions of law presented, briefly stated, are:

1. When an indictment patently reveals certain offenses charged occurred more than three years before it was filed and it therefore alleges defendant's absence from the state for the period necessary to toll the statute of limitations, should not the court before accepting a plea of guilty,—as a fundamental part of the due process of law to which every defendant in a criminal case is entitled under the Fourteenth Amendment—make adequate inquiry to ascertain if it really has jurisdiction?

2. Unless expressly waived, is not the reading of the indictment to the defendant a necessary condition, under the requirement of due process, to the validity of a plea of guilty, particularly where a jurisdictional matter is alleged in the indictment upon the truth of which the court's jurisdiction is dependent?

3. If a hearing is had in a criminal case charging a felony, in order to satisfy the due process of law requirement as guaranteed by the Fourteenth Amendment to the Constitution, should not the court conduct an adequate hearing in order to properly determine facts necessary for its jurisdiction?

4. Is due process of law afforded a defendant in a criminal matter when a colloquy between the court and defendant's counsel indicates grave doubt as to the court's jurisdiction and yet the court makes a jurisdictional finding upon an obviously coerced response by defendant to a vague, unclear and uncertain question by the court? Is such a hearing the type of hearing guaranteed by the Fourteenth Amendment to the Constitution of the United States?

5. Is due process of law afforded a defendant in a criminal matter when at the time of the entry of his plea of guilty it is uncontradicted that he was suffering serious physical disability and severe mental stress to an extent which effectively precluded a free and voluntary exercise of petitioner's will with respect to the entry of such plea?

Statement.

Petitioner, Homer W. Snowden, seeks to review an order of the Superior Court of Los Angeles County, State of California, denying his motion to set aside and vacate the judgment and sentence imposed upon him and to permit him to withdraw his pleas of guilty to counts 2 and 3 of an indictment and to enter pleas of not guilty thereto. This order was affirmed by the District Court of Appeal of California (Appendix A) and the Supreme Court of California denied a hearing May 22, 1957 (Appendix A).

Based upon certain financial transactions with the Constitutional Life Insurance Company in November, 1951, the Los Angeles Grand Jury, 3½ years later on May 3, 1955, returned an indictment charging appellant and three others (each of whom was freed) with one count of conspiracy and thirteen counts of grand theft. [Clk. Tr. pp. 1-21.]

After pleading not guilty as to all counts [Clk. Tr. p. 28], on April 20, 1956 [Clk. Tr. p. 30], the following proceedings took place [Rep. Tr. pp. 15-21]:

"The Court: Mr. Ehrlich, on behalf of Homer W. Snowden?

Mr. Ehrlich: Your Honor, may the defendant Homer Snowden be given permission at this time to withdraw his former plea of not guilty for the purpose of entering another and different plea as to Counts 2 and 3 of the indictment?

The Court: Is that satisfactory to the People, Mr. Lindley?

Mr. Lindley: Yes, your Honor. And in accordance with the recommendation." [Rep. Tr. p. 16, lines 13-21.]

* * * * * * * *

"The Court: Mr. Homer Snowden, permission has been requested by your counsel for permission for you to enter a plea of guilty to the charges contained in Counts 2 and 3. Are you familiar with those charges, sir?

Defendant Homer Snowden: Yes, sir.

The Court: And are you pleading guilty to those charges freely and voluntarily and because you believe you are guilty of those offenses?

Defendant Homer Snowden: Yes, sir.

The Court: Has anybody forced you or persuaded you to plead guilty to those charges against your will and without your consent?

Defendant Homer Snowden: No, sir.

The Court: Has anybody given you any promise of reward or hope of immunity or leniency for pleading guilty?

Defendant Homer Snowden: No, sir.

The Court: And the People having indicated that is satisfactory, you may rearraign each defendant as indicated, Mr. Lindley." [Rep. Tr. p. 17, line 14, to p. 18, line 6.]

* * * * * * * *

"Mr. Lindley: Homer W. Snowden, through your counsel you have indicated to the Court you wish to withdraw your plea of not guilty to Counts 2 and 3 of this Indictment. How do you now plead to the charge set forth in Count 2 of this Indictment? Guilty or not guilty?

Defendant Homer Snowden: Guilty.

Mr. Lindley: How do you plead to the charge set forth in Count 3 of this Indictment? Guilty or not guilty?

Defendant Homer Snowden: Guilty." [Rep. Tr. p. 18, lines 16-25.]

On August 10, 1956, the date fixed by the court for pronouncement of judgment and sentence, the following occurred [Rep. Tr. pp. 26-56]:

"The Court: . . . Now, in this respect, as to the indictment that has been returned in this matter, Mr. Homer Snowden, the Court—in the indictment it is alleged, among other things, that you were absent from the State of California for the period from November, 1952, to the date of the return of this

indictment. Do you admit that, Mr. Homer Snowden —you admit that allegation? Do you understand that?

Mr. Ehrlich: Yes.

The Court: You understand the reason?

Mr. Ehrlich: *Yes, but that doesn't happen to be true. In view of our position, why, I presume that—*

The Court: Well, of course, it is the Court's belief and understanding that a plea of guilty will admit the four corners of the indictment. However, I would like to have the personal acknowledgment from the defendant so that there—

Mr. Ehrlich: *We will have to admit that we were not here under all those circumstances.*

The Court: You will so advise your defendant in that matter?

Mr. Ehrlich: Yes.

The Court: Mr. Snowden, then do you admit the allegation that you were absent from the State of California for *a* period from November, 1952; to the date of the return of this indictment; is that correct, sir?

Mr. Ehrlich: The answer is 'Yes,' Mr. Snowden.

The Court: Do you answer that 'Yes'?

Defendant Homer W. Snowden: Yes." [Rep. Tr. p. 28, line 4, to p. 29, line 6.] (Emphasis added.)

After argument for clemency on behalf of petitioner by his attorney, Mr. Ehrlich, wherein he protested petitioner's innocence in no uncertain terms and offered an affidavit as to his innocence, stating that petitioner had pleaded guilty because his health was such the ordeal

of trial would be fatal, the court made the following remarks:

> *"It was rather interesting in listening to your discussion, Mr. Ehrlich, to determine whether or not your plea was one to set aside the motion of plea of guilty or one in mitigation of the punishment. Of course, I realize it is not a motion to set aside the plea of guilty, but, nevertheless, some of the things advanced in your comments might well have been advanced on a motion to set aside the plea of guilty."* [Rep. Tr. p. 48, lines 11-18.] (Emphasis added.)

The court then sentenced petitioner to prison for the term prescribed by law, namely, one to ten years. [Rep. Tr. pp. 53-54.]

On August 23, 1956, petitioner filed a motion to set aside and vacate the judgment and to withdraw his plea of guilty and to enter pleas of not guilty as to counts 2 and 3 [Clk. Tr. pp. 34-37] on the grounds that:

1. The court lacked jurisdiction because the crimes charged were barred by the statute of limitations.

2. Petitioner was never advised as to his rights relative to the statute of limitations. Had he been so advised he would not have pleaded guilty.

3. Petitioner is innocent but pleaded guilty upon the representation of his attorney, concurred in by the deputy district attorney, that his guilty plea was only to a misdemeanor and he would be placed on probation.

4. That petitioner's health was in such bad state he was advised the ordeal of a trial would prove fatal, hence he agreed to enter a plea of guilty even though he was guiltless.

Petitioner's motion was supported by numerous affidavits. [Clk. Supp. Tr. pp. 16-57.] Affidavits pertaining to the desperate state of petitioner's health and to the fact he was not absent from the state the required time to toll the statute of limitations were uncontradicted.

Hearing by the trial court was held on August 24, 1956, at which time the motion to set aside the judgment was denied. [Rep. Tr. pp. 114-115.] Appeal was then instituted, perfected and rejected by the appellate court. (Appendix A.)

The substantial federal questions set out above involving as they do the basic rights of defendants in criminal cases guaranteed by the Fourteenth Amendment to the Constitution of the United States were raised below not in express terms but by clear intendment as the record as a whole shows. [Clk. Tr. pp. 35, 36-37; Clk. Supp. Tr. pp. 7-9, 17-26, 36-38.] (*New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67; *Crowell v. Randell*, 10 Pet. 368; *St. Louis, I. Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 598-599.)

Reasons for Granting the Writ.

The factual situation relating to the changing of petitioner's plea from not guilty to guilty and the hearing afforded petitioner concerning the jurisdictional questions of the offenses charged being barred by the statute of limitations are fully set forth herein under "STATEMENT." The record reveals the following errors which resulted, it is submitted, in a denial of due process to petitioner (*McNabb v. United States*, 318 U. S. 332):

(a) When the court directed the deputy district attorney to rearraign petitioner, he merely asked, "How do you now plead to the charge set forth in

Count 2 of this indictment," and, "How do you plead to the charge set forth in Count 3 of this indictment?" [Rep. Tr. p. 18, lines 16-24.]

Petitioner responded: "Guilty." No mention was made as to the allegation contained in the last count of the indictment that defendant was absent from the State from November, 1952, to May 3, 1955.

Such was not a proper arraignment. It fell far short of the mandate of California Penal Code, Section 998, which requires "reading the accusatory pleading to the defendant." The defendant was not even told that Counts 2 and 3 charged grand theft, a felony. More important, the failure to ask the defendant to admit or deny the allegations relating to jurisdiction—his alleged absence from the State—was more than error—it was an absolute jurisdictional fatality resulting in a void plea. Fundamental requirements essential to the due process of law to which defendants in criminal cases are constitutionally entitled were violated. (*State ex rel. Henning v. Jameson*, 71 S. D. 144, 22 N. W. 2d 731 (1946).)

(b) At the time of sentence the trial court rightfully made inquiry as to the time of petitioner's alleged absence from the State in order to determine if it had jurisdiction to accept the plea and pronounce judgment and sentence. In making such inquiry haste displaced patient discovery of truth and failed to produce judicial finding based on fact. (*Norman v. State*, 81 Okla. Cr. 78, 160 P. 2d 739 (1945).) Upon voicing the question as to petitioner's period of absence from the State the court was promptly informed that the allegation in the indictment regarding his absence was *not true* but "under all those

circumstances" the petitioner's attorney prompted petitioner to utter a false "yes." (See, *Wilson v. State*, 222 Ind. 63, 51 N. E. 2d 848 (1943); *Abraham v. State*, 228 Ind. 976, 91 N. E. 2d 358 (1950).)

Because of its vital importance to the issues presented and because it reveals the tragic injustice which has occurred the pertinent part of the record relating to this untrue admission of absence is repeated:

"The Court: . . . Now, in this respect, as to the indictment that has been returned in this matter, Mr. Homer Snowden, the Court . . . in the indictment it is alleged, among other things, that you were absent from the State of California for the period from November, 1952, to the date of the return of this indictment.

Do you admit that, Mr. Homer Snowden—you admit that allegation? Do you understand that?

Mr. Ehrlich: Yes.

The Court: You understand the reason?

Mr. Ehrlich: *Yes, but that doesn't happen to be true. In view of our position, why, I presume that—*

The Court: Well, of course, it is the Court's belief and understanding that a plea of guilty will admit the four corners of the indictment. However, I would like to have the personal acknowledgment from the defendant so that there—

Mr. Ehrlich: *We will have to admit that we were not here under all those circumstances.*

The Court: You will so advise your defendant in that matter?

Mr. Ehrlich: Yes.

The Court: Mr. Snowden, then do you admit the allegation that you were absent from the State of California for a period from November, 1952, to

the date of the return of this indictment; is that correct, sir?

Mr. Ehrlich: The answer is 'Yes,' Mr. Snowden.

The Court: Do you answer that 'Yes.?'

Defendant Homer W. Snowden: Yes." [Rep. Tr. p. 28, line 4, to p. 29, line 7.] (Emphasis added.)

This portion of the record makes it apparent that petitioner was deprived of his basic rights under the due process clause of the Fourteenth Amendment:

1. Petitioner's then attorney informed the court the essential allegation in the indictment as to petitioner's absence from the State *"doesn't happen to be true."*

2. Nevertheless, in the interest of expediency rather than truth and justice the attorney, immediately after stating to the court that the allegations of absence were *not true* stated to the court *"we will have to admit we were not here under all those circumstances."*

3. The court, after being informed by counsel that these allegations—without which the indictment could not be sustained—were *not* true then asked counsel to advise the defendant in the matter.

4. With no time intervening to advise the defendant the court asked defendant if he admitted the allegation that he was absent from the State "for a period from November, 1952, to the date of the return of the indictment"—not even specifying the date the indictment was filed. To this question petitioner was commanded by his counsel, "The answer is 'Yes,' Mr. Snowden" and, parrot-like, petitioner said "Yes."

It is firmly established that an intelligent and full understanding by the accused of the charge against him is a first requirement of due process. *Smith v. O'Grady*, 312 U. S. 329, 334; *Bergen v. United States*, 145 F. 2d 181, 187 (C. A. 8, 1944); *Ammons v. King*, 133 F. 2d 270, 272 (C. A. 8, 1943).

> "There are advantages, both to society and to the accused from the willingness of trial courts to accept pleas of guilty when voluntarily and properly made. The courts have held, however, that to be accepted they must be understandingly made." (*Leonard v. United States*, 231 F. 2d 588, 590-1 (C. A. 5, 1956). See *United States v. Davis*, 212 F. 2d 264, 267 (C. A. 7, 1954).)

The record, it is submitted, is clear in establishing that petitioner did not enter his plea understandingly or with that full comprehension of the charge against him which due process of law demands. The factors present here bring this case within the exception to the rule which requires a court to permit the withdrawal of a plea of guilty to avoid manifest injustice and where such plea was made under circumstances violative of the accused's constitutional rights under the due process clause of the 14th Amendment.

> "When there is reason to believe that a plea has been entered through inadvertence, or without due deliberation, or ignorantly, the Court should be indulgent in permitting the plea to be withdrawn. It might well be added that a Court, in furtherance of justice, and upon such terms as may be proper and just, should likewise 'relieve a party from a judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise or excusable neglect.' (Citing Section 473, C. C. P.)

> For how can it be contended seriously that when an *inalienable constitutional right of a citizen* is at stake in a criminal proceeding, a greater and more technical showing is necessary than is contemplated by our civil law when relief is sought from the judgments or orders taken against him. Where a right is conferred by law, everything necessary for its protection is also conferred." (Emphasis added.)
>
> *People v. McGarvy*, 61 Cal. App. 2d 557, 42 P. 2d 92 (1943), citing *People v. McCrory*, 41 Cal. 458, 462.

A cursory hearing which is plainly insufficient to guide the court to a proper conclusion upon a factual matter that goes to the very roots of the court's jurisdiction is an absolute denial of due process of law as guaranteed by *both the Federal and California Constitutions.* As stated in 11 *Cal. Jur.* 2d, page 808:

> *"It is a cardinal principle of due process* that no one shall be bound or concluded by a judgment, either in respect to his person or his property, unless he has had his day in court. By this is meant that a person shall not be so bound until he has been duly cited to appear and has been afforded an opportunity to be heard and, upon such hearing, to offer evidence in support of his cause. If his right to a hearing depends upon the will or caprice of others, or upon the discretion of the judge who is to make a decision on the issue, he is not protected in his constitional rights. A judgment without such opportunity is lacking in all the attributes of a judicial determination." (Emphasis added.)

The court in *In re Buchman's Estate,* 123 Cal. App. 2d 546, 267 P. 2d 73 (1954), tersely stated what "due

process" means with reference to a judicial hearing, saying:

> "Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. *The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure.*" (Emphasis added.)

With respect to petitioner's physical condition it is uncontradicted in the record that for a considerable period of time prior to the date when he changed his plea on April 20, 1956, petitioner had been—and still is—suffering from a number of serious physical disabilities including possible polycythemia, hypertensive heart disease, coronary artery disease, arteriosclerosis, diabetes, mellitus, peripheral polyneuritis, and partial blindness. [Clk. Supp. Tr. pp. 17-23, 36-38, 39-40.]

It is further uncontradicted that just prior to the trial date, petitioner was advised by his doctors that the stress and strain of a trial would probably prove fatal to him. [Clk. Supp. Tr. p. 18.] Detailed affidavits are set forth in the Clerk's Supplemental Transcript on pages 17-23, 36-40, showing reports of Dr. Winslow, Dr. Jackson and Dr. Roberts which reflect the extent of petitioner's physical and mental disability and his inability to stand a trial.

In addition, an independent examination of petitioner was made just prior to the trial by Dr. Marcus Crahan, the official physician for the Los Angeles County Jail,

which showed that the petitioner's heart had deviated off of its axis; that petitioner was suffering from uncontrollable diabetes mellitus which approached the extreme of diabetic coma and that the petitioner was partially blind. [Clk. Supp. Tr. pp. 21-23.]

At the time the petitioner was in court on the day he changed his plea on April 20, 1956, he was in such severe physical pain that he was unable to think clearly. [Clk. Supp. Tr. p. 24, lines 13-14.] The affidavit of Dr. Martin, a specialist in internal medicine, states that petitioner's cerebro-vascular sclerosis and episodes of cerebro-vascular spasms accompanied by cerebro-edema, results in an inevitable functional impairment of petitioner's brain with concomitant mental confusion and impairment of judgment whenever the petitioner suffers from any undue stress, which could easily prove fatal. [Clk. Supp. Tr. p. 37, line 26, to p. 38, line 4.]

The foregoing is, of course, only a brief summary of petitioner's physical and mental condition at the time in question, and his condition is set forth in considerably more detail in the affidavits of the various doctors included in the Clerk's Supplemental Transcript, which include the fact that the petitioner is 80% blind, and as is pointed out in petitioner's own affidavit, since he is unable to read he must rely upon the advice of attorneys in all of his business transactions. [Clk. Supp. Tr. p. 32, lines 16-20.]

The situation facing petitioner amounted in truth to outright coercion and duress in that he was forced to plead guilty to charges of which he was innocent in order not to sign his own death warrant by being subjected to the strain of a protracted trial.

Where a plea of guilty is so coerced that it is deprived of the validity needed to support the conviction, the coercion likewise deprives the plea of validity as a waiver of the accused's right to assail a conviction.

Waley v. Johnston, 316 U. S. 101.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

TOBIAS G. KLINGER,

Counsel for Petitioner.

Dated: August 8, 1957.

APPPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Homer W. Snowden, Defendan. and Appellant. Criminal No. 5795.

Filed Mar. 29, 1957.

Appeal from judgment and order of the Superior Court of Los Angeles County. Clement D. Nye, Judge. Affirmed.

Belli, Crowley & Ford and Arthur J. Crowley for Appellant.

Edmund G. Brown, Attorney General, Clarence A. Linn, Assistant Attorney General, and Victor Griffith, Deputy Attorney General, for respondent.

This is an appeal by defendant Homer W. Snowden from a judgment of conviction and from an order denying his motion to set aside and vacate said judgment and to withdraw his pleas of guilty to counts 2 and 3 of an indictment and to permit him to enter pleas of not guilty thereto.

As a result of certain financial transactions with the Constitution Life Insurance Company in November, 1951, the Los Angeles County grand jury on May 3, 1955, returned an indictment charging W. Solon Snowden, Ross Bohanon, A. D. Hudspeth and Homer W. Snowden (appellant herein) with one count of conspiracy (Pen. Code, sec. 182) and thirteen counts of grand theft[1] (Pen. Code, sec. 487.1).

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[1]A total of $278,934.60 was asserted involved in these transactions. The insurance company appears to have been fully reimbursed together with interest.

Defendant Homer W. Snowden employed J. W. Ehrlich, Esq., to represent him for a fee of $56,000[2] which he assertedly paid. After pleading not guilty to all counts, defendant Homer W. Snowden on April 20, 1956,[3] changed his plea to guilty as to counts 2 and 3 of the indictment. In that respect the reporter's transcript discloses the following proceedings:

"Mr. Ehrlich: Your Honor, may the defendant Homer Snowden be given permission at this time to withdraw his former plea of not guilty for the purpose of entering another and different plea as to Counts 2 and 3 of the indictment?

"

"The Court: Mr. Homer Snowden, permission has been requested by your counsel for permission for you to enter a plea of guilty to the charges contained in Counts 2 and 3. Are you familiar with those charges, sir?

"Defendant Homer Snowden: Yes, sir.

"The Court: And are you pleading guilty to those charges freely and voluntarily and because you believe you are guilty of those offenses?

"Defendant Homer Snowden: Yes, sir.

"The Court: Has anybody forced you or persuaded you to plead guilty to those charges against your will and without your consent?

"Defendant Homer Snowden: No, sir.

---

[2]This fee did not include counsel's per diem for the trial.

[3]At this same court session the indictment against Bohanon was dismissed on motion of the district attorney and defendant W. Solon Snowden entered a plea of guilty to counts 6 and 10.

"The Court: Has anybody given you any promise of reward or hope of immunity or leniency for pleading guilty?

"Defendant Homer Snowden: No, sir.

"The Court: And the People having indicated that is satisfactory, you may rearraign each[4] defendant as indicated, Mr. Lindley."

At the time of arraignment for judgment on August 10, 1956, the court pointed out to defendant Homer W. Snowden (hereinafter referred to as the defendant) that it is alleged in the indictment that "you were absent from the State of California for *the* period from November, 1952, to the date of the return of this indictment" (emphasis added) and inquired whether he admitted that allegation. Mr. Ehrlich responded:

"We will have to admit that we were not here under all those circumstances.

"The Court: Mr. Snowden, then do you admit the allegation that you were absent from the State of California for a period from November, 1952, to the date of the return of this indictment; is that correct, sir?

"Mr. Ehrlich: The answer is 'Yes,' Mr. Snowden.

"The Court: Do you answer that 'Yes'?

"Defendant Homer W. Snowden: Yes."

Thereafter, Mr. Ehrlich stated there was no legal cause for not disposing of the matter and addressed himself to the question of probation for his client.[5] Probation, how-

[4]The other defendant rearraigned at this time was W. Solon Snowden.

[5]W. Solon Snowden, who was represented by Robert Eaton, Esq., was granted probation on this occasion.

ever, was denied and the defendant was sentenced to the state prison, the sentences on the two counts to run concurrently. The remaining counts were dismissed.

On August 23, 1956, defendant filed a motion to vacate the judgment and to withdraw his plea of guilty, and to enter pleas of not guilty to counts 2 and 3, on the grounds that:

1. The court lacked jurisdiction over the offenses in question because it was alleged they were committed in November, 1951, and thus the statute of limitations had run.

2. He was never advised as to his rights relative to the application of the statute of limitations. Had he been advised, he would not have pleaded guilty.

3. He is innocent but pleaded guilty by reason of fraud exercised upon him, in that his attorney represented and the deputy district attorney concurred that if he pleaded guilty he would be pleading guilty to a misdemeanor, and that he would be placed on probation; and, relying on these representations, he pleaded guilty.

In an affidavit in support of his motion defendant stated, *inter alia*, that his attorney, Mr. Ehrlich, had advised him that if he plead guilty to counts 2 and 3 of the indictment he would be pleading guilty to misdemeanors[6] only and

[6]The idea that these transactions were only misdemeanors, or might be so considered, is based on the provisions of section 1101 of the Insurance Code, which prohibits anyone who is an officer of an insurance company, or who has authority in the management of its funds, from borrowing from the company. The theory is that defendant had such authority and that since the transactions here in question were in the form of loans to defendant the provisions of this section were thus violated; and that since no penalty is expressly provided therefor the violations would thus be classed as misdemeanors.

that he would get probation. This was on the morning of April 20, 1956, prior to the opening of court. Defendant further states in his affidavit: "That Mr. Ehrlich then called Mr. Logan Lindley, the Deputy District Attorney, over and stated to him in my presence that if I pleaded guilty to counts 2 and 3 of the indictment, the other charges would be dismissed and that the Deputy District Attorney would then submit a statement to the court that no one had lost any money as a result of the dealings that I was charged with, and that I would be pleading guilty to two misdemeanors and would receive probation. That at this time Mr. Lindley then replied, 'That is the understanding.'"

The defendant further stated that "at the time" he was feeling so weak and ill that he could hardly stand up and felt he was going to faint at any moment. However, he stated earlier in his affidavit that he told Mr. Ehrlich on that morning (April 20th) that he wished to go to trial, the case being set for trial on April 23rd. Other affidavits were filed on behalf of defendant detailing his physical disabilities and indicating that some of them were of a serious nature.

On this occasion in addition to Mr. Ehrlich the defendant had present two other lawyers—Lester May and Dan Gibbs, Esquires—from Texas. May had conferred with Ehrlich in San Francisco and, on April 19th, had telephoned defendant to be in court the next morning and had advised him of the purpose of this appearance.

Deputy District Attorney Lindley testified that he never told the defendant or his attorney that if the defendant pleaded guilty to two counts of the indictment they would be misdemeanors, or that the defendant would be given a county jail sentence or probation and Lindley further

testified that he never heard Mr. Ehrlich make a statement to that effect or that the deputy district attorney would submit a statement to the court that no one had lost any money as a result of the dealings with which the defendant was charged. Nor, did he ever state to Mr. Ehrlich that it was his understanding that the defendant would be given probation.

Mr. Ehrlich did not testify at the hearing on the motion to vacate the judgment and to withdraw the pleas of guilty, nor did he file any affidavit in support of defendant's motion.

At the hearing on the motion the record preliminary to the defendant's change of pleas, as set out above, was read to the court.

No suggestion appears to have been made at the probation hearing or when the defendant was sentenced to the state prison that the offenses to which he had pleaded guilty and for which he was being sentenced were only misdemeanors.

In seeking a reversal defendant makes three contentions: (1) he was suffering from such physical and mental disabilities that his free will and clear judgment were overreached to such a point that he was incapable of having any free will; (2) he changed his plea to guilty on the representation of his attorney, corroborated by the deputy district attorney handling his case, that he would be pleading guilty only to two misdemeanors and would be granted probation; and (3) the statute of limitations had expired and the judgment was therefore void. None of these contentions warrant a reversal.

Defendant's first and second contentions involve purely factual considerations which the trial court has resolved

against him. Because of defendant's obvious interest in the outcome of this proceeding the trial court was not required to give full credence to his statements either in his affidavit or on the witness stand. It was also the trial court's responsibility to evaluate the opinions of the doctors who had examined the defendant some of which were quite indecisive, as, *e. g.* that of Dr. Marcus Crahan who opined that defendant had "a complicated series of organic abnormalities which taken in combination present a picture of serious illness with the immediate as well as the remote prognosis *guarded.*" (Emphasis added.)

On this eventful occasion defendant not only had at his side eminent California counsel but also two lawyers from a sister state, one of whom had consulted with Mr. Ehrlich and had arranged the day before for defendant to be in court that morning and had explained to him the purpose of the court appearance which was undoubtedly to change his plea since the case was set for trial the following Monday. It does not appear that defendant made any complaint to the probation officer that he had been incapable of exercising his free will and forming an independent judgment at the time he entered his pleas of guilty on April 20th. No such suggestion was made by counsel at the probation hearing and pronouncement of judgment on August 10th. Ten days later, however, he signed an affidavit indicating he was too ill and too disturbed to exercise an independent judgment. In evaluating this plea the trial court was entitled to take into consideration these facts: The physical appearance of the defendant on April 20th when he pleaded guilty; that four months had gone by since the change of plea, probation had been denied, and a prison sentence pronounced without any suggestion on the part of defendant or his counsel that defendant was not

capable of exercising an independent judgment. In these circumstances it cannot be said, as a matter of law, that the trial court abused its discretion in the premises.

As to defendant's second contention: viz., that he was induced to change his pleas by reason of representations of his attorney,[7] concurred in by the deputy district attorney, that he would only be pleading to misdemeanors and would get probation, the evidence is in sharp conflict. Mr. Lindley, the deputy district attorney, denied making any such statements either to defendant or to Mr. Ehrlich, and denied hearing Mr. Ehrlich make any such statements to the defendant or otherwise.[8] The trial court resolved this conflict against the defendant and such resolution is binding on this court.

In summing up the factual aspects of the hearing the trial judge made the following pertinent observations:

"The Court: This is, as far as I can see, another case we run into occasionally where a person gambles

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[7]If defendant changed his pleas solely on the advice of his counsel he clearly is not entitled to any relief. (People v. Sciunzi, 140 Cal. App. 70, 71; People v. Gottlieb, 25 Cal. App. 2d 411, 415; People v. Ayala, 138 Cal. App. 2d 243, 249-250.)

[8]On this phase of the hearing Deputy District Attorney Lindley testified, in part, as follows:

"Q. [By Mr. Stovitz] Did you ever tell Mr. Ehrlich that if the defendant pled guilty to two charges that they would be misdemeanors?

"

"The Witness [Deputy District Attorney Lindley]: I did not.

"Q. [By Mr. Stovitz] Did you ever tell Mr. Ehrlich that the defendant Homer W. Snowden or any of the defendants would be given a County Jail sentence?

"A. I did not.

"Q. Or that Mr. Homer W. Snowden would be given probation?

"A. I did not.

"

"Q. Did you ever hear Mr. Ehrlich say that morning on April 20th either in the presence of Mr. Homer W. Snowden or out of

and loses . . . [T]his Court cannot find that there was anything done by the Court or any responsible officer of the Court that would overreach the free and unimpaired judgment of the defendant. I asked him at the time the plea was entered if it was done freely and voluntarily and because he believed he was guilty of the offense, and he unequivocably [*sic*], 'Yes,' and all during the proceedings from the date of the plea on April 20 to the date of the sentence on August 10, not one word was indicated to the Court through the probation officer or through any other mediums that he was not entering that plea of guilty freely and voluntarily. Only after August 10 when he finds out that the gamble he took did not pay off, then he wants to come in and get his stakes back."

There is no merit in defendant's final contention that the statute of limitations had run on these offenses and therefore the judgment was void. True, the offenses were al-

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the presence of Homer W. Snowden that if Homer W. Snowden pled guilty to counts two and three of the indictment the other charges would be dismissed and that the Deputy District Attorney would then submit a statement to the Court that no one had lost any money as a result of the dealings that Homer W. Snowden was charged with and that Homer W. Snowden would be pleading guilty to two misdemeanors and would receive probation?

"A. No, sir.

"Q. Did you overhear any portion of that statement?

"A. I overheard no portion of that statement.

"Q. Did you ever state to Mr. Ehrlich in the presence of Mr. Homer W. Snowden or any other time that it was your understanding that Homer W. Snowden would be given probation?

"A. I did not.

"Q. Or that it was your understanding that Mr. Homer W. Snowden was pleading guilty to two misdemeanors?

"A. I did not.

"Q. Now, Mr. Lindl[e]y, did you at any time make any representations to Mr. Ehrlich or to anyone else as to what the punishment in this case would be?

"A. I did not."

leged to have been committed in November, 1951, and the applicable statute of limitations is three years (Pen. Code, sec. 800). But the indictment contained the allegation: "That the defendants were absent from the State of California for the period from November, 1952, to the date of the return of this indictment."

The time a defendant is absent from the state is excluded in determining whether the statute of limitations is a bar to his prosecution. (Pen. Code, sec. 802; People v. Newell, 192 Cal. 659, 669-670; People v. Levine, 114 Cal. App. 2d 616, 617.)

In the instant matter, the defendant, in response to questions by the court, admitted the allegation in the indictment that he was "absent from the State of California for *the* period from November, 1952, to the date of the return of this indictment." (Emphasis added.)

Defendant makes a quibbling argument based on the circumstance that when the trial judge repeated to defendant the inquiry whether he admitted he was absent from the state from November, 1952, to the date the indictment was returned he used the article "a" rather than "the" with reference to the period of such absence. Defendant replied in the affirmative. He now argues that such answer is not an admission that he had been absent from the state for *the* period from November, 1952, to the date the indictment was returned. When the judge asked the question initially he used the words "the period" in the context quoted in the preceding paragraph. Mr. Ehrlich said he understood the matter and proceeded to give an affirmative reply. The court however required the personal acknowledgement of the defendant and suggested that Mr. Ehrlich so advise the defendant. The court then repeated the question but used the article "a" instead of "the" before

the word "period". Mr. Ehrlich advised the defendant, "The answer is 'Yes,' . . ." The defendant then answered in the affirmative. In the context there is no reasonable basis for believing that either the defendant or his attorney was either misled or confused. At the time of the probation hearing and pronouncement of sentence there was no suggestion that defendant had not been absent from the state for *the* period in question.

The judgment and order are affirmed.

Fox, *J.*

We concur:
MOORE, *P. J.*
ASHBURN, *J.*

Order of Supreme Court of California Denying Hearing After Judgment by District Court of Appeal.

Order Due May 28, 1957

Order Denying Hearing After Judgment by District Court of Appeal, 2nd District, Division 2, Crim. No. 5795.

In the Supreme Court of the State of California in Bank.

People v. Snowden.

Appellant's petition for hearing DENIED.

Filed May 22, 1957.

WILLIAM I. SULLIVAN, *Clerk*

By .....
S. F. Deputy

GIBSON,
Chief Justice